IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

GWENDOLYN SMALLS, as Administratrix of the Estate of LINWOOD RAYMOND LAMBERT, JR., deceased,

Plaintiff,

Civil Action No. 4:15CV00017

v.

CHIEF OF POLICE, JAMES W. BINNER, COLONEL,
Individually and in his official capacity, et als.,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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COME NOW Defendants, by counsel, and file this their Response to Plaintiff's Motion for Partial Summary Judgment. ECF#127.

I. Plaintiff's Statement of Undisputed Facts

Plaintiff filed, contemporaneously with her motion, a "Statement of Undisputed Facts." See ECF#127-2. This statement of facts is substantially repeated in Plaintiff's Memorandum of Law. ECF#127-3. Despite its phrasing, Plaintiff's Statement of Undisputed Facts is anything but. Plaintiff's Statement takes quotations from, and Plaintiff paraphrases portions of, deposition testimony out of context, thus, resulting in a misleading and inaccurate recitation of facts. In her Memorandum of Law, once again Plaintiff attempts to use inflammatory language (substituting "torture" for the word "murder" that was stricken from her Amended Complaint) to add bluster to her allegations. Despite Plaintiff's attempts to inflame and distort the events of May 4, 2013, it is respectfully submitted that the videos available for the Court's review provide the clearest lens through which to view the material facts which are not in dispute.

a. The Dashboard Videos Speak for Themselves

When evaluating the qualified immunity question in this case, "the immunity inquiry must be filtered through the lens of the officer's perceptions at the time of the incident in question." Thomas v. Holly, 533 Fed. Appx. 208, 217 (4th Cir: 2013) quoting Sevigny v. Dicksey, 846 F.2d 953, 957 (4th Cir. 1988). Unlike many cases where the only evidence is the Officers' own recollection of events, this case benefits from the dashboard camera videos that captured the sequence of events at the Halifax Regional Hospital. The videos speak for themselves, and regardless of Plaintiff's interpretation of those events, see ECF#127-2 at, *inter alia*, parts b., c., d., e., the videos demonstrate four undisputable material facts:

1. Linwood Lambert, Jr., even while handcuffed, destroyed the window of a police vehicle.
2. Linwood Lambert, Jr. rammed into the doors of the Halifax Regional Hospital with such force that he dislodged them from their tracks.
3. Linwood Lambert, Jr., though in restraints (i.e. handcuffs, and later handcuffs and shackles), was not restrained nor under control, as he continuously disobeyed the Officers' commands.
4. No Defendant deployed their Taser against Linwood Lambert, Jr. before he destroyed the police car window nor after he was restrained and under control in the back seat of the police vehicle.

b. Plaintiff's Use of Deposition Testimony

While Plaintiff paraphrases, or in some cases quotes directly, from various depositions in the case, there are repeated instances where Plaintiff's conclusions are not supported by the actual statements of the deponents.

For example, Plaintiff alleges that it is undisputed that "Before tasing Lambert, Bratton, Mann and Clay, the officers did not consider alternative uses of force even though three officers were present and Lambert was unarmed and restrained." ECF#127-2 at para. 153. To support such a conclusion, Plaintiff relies on the deposition testimony of Officer Travis Clay at pages 105 – 106 of his deposition. Id. However, a careful review of those selected pages reveal that Officer Clay was not asked whether he considered using alternative uses of force. Rather, he was asked whether there were other use of force options that could have been deployed.[1] Counsel for Plaintiff then

[1] See Clay Deposition at p.105 ("Q:And did you – and were there other force options, other than taser, that you could have deployed before he was tased on May 4, 2013? A: Other than going hands on with the suspect standing, no."

engages Officer Clay in a detailed discussion about other use of force options and why those options were not used. See Clay Deposition at pp.105-106. Plaintiff is inaccurate when she proffers that it is undisputed that Officer Clay "did not consider alternative uses of force."

Further, Plaintiff attempts to persuade the Court that "Corporal Bratton admits she tased Lambert merely for failing to comply with verbal commands." ECF#127-2 at para. 127. The use of the word "merely" is misleading. In fact, when that word was used in the deposition of Officer Bratton, she asked for clarification of the question, and even clarified her answer, stating "Did I taser him for only – for not complying with what I asked him to do? Q: With verbal commands; right? A: Yes." Bratton Deposition at 108. What Plaintiff leaves out is the context. It is undisputed that Linwood Lambert, Jr. kicked out the window of a police vehicle. ECF#127-2 at para. 38. In addition to kicking out the window, Linwood Lambert, Jr. was out of control and not obeying the Officers' verbal commands. The Officers did not deploy their tasers until *after* Mr. Lambert became violent and destructive. This is equally true with Officer Clay's statement quoted by Plaintiff in paragraph 128. Id. at para. 128. Linwood Lambert, Jr. was tased not *merely* because he failed to obey verbal commands, but because he was violent, destructive, and uninhibited by any verbal commands by the Officers.

While Plaintiff accurately states that Officer Bratton never claimed that Mr. Lambert was verbally aggressive, it must be recognized that the context in which testimony is given matters. When asked why her use of force was justified, she testified that, "His verbal demeanor was never aggressive. Even when he was being tasered, he was never aggressive verbally. It was his *actions*, not what he was saying." Bratton Deposition (Vol. II) at p.16 (emphasis added). "Those actions are him kicking out a window. Those actions are him running so hard with such force that he knocked a door off the track and bent the frame, and also his actions when he was asked to roll over on his stomach and stay on his stomach and he did not. And then once again, once got in the car, he attempted to bite Officer Clay. He attempted to lay down again. He even put his feet back out of the window when they were already shackled, so all of that." Id. at pp.16-17.

Finally, Plaintiff posits that "Mann admits that tasing is not justified if an individual is restrained or under control." ECF#127-2 at para.133. Plaintiff inappropriately leaves out the very detailed explanation of how that bare statement was inapplicable to Linwood Lambert, Jr. because Mr. Lambert was never restrained or under control:

> "Q: Did you violate this [use of force policy] – did you or your fellow officers violate this policy on May 4th, 2013?
> A: No.
> Q: Why is that?
> A: Well, if you read, it says 'has been restrained or under control.' Well, that's going to be left up to the articulation of the officer. You got to have a reason of why to use that force. In this case, Mr. Lambert was not restrained. As you could see on the video, as he got out of the car, he ran towards the door.
> He was in handcuffs, yes, which is a restraint. That's – put in handcuffs doesn't say restrained. It says, "restraints" Okay? He got out of the car and run straight to the door. He's not restrained or he's not under control. His movement is not limited. Only the movement of his hands is limited.
> And he still can take the handcuffs, which is behind his back, and pull them out from behind his back and go under his legs, which I have seen done many times, and come out in front. And then his hands are partially restrained then, I guess you would say, because you still could move them. So, no; he was not restrained or under control."

Mann Deposition at pp. 145-146.

c. Plaintiff's Use of Taser Logs is Misleading

Plaintiff attempts, at great length, to persuade the Court that it is undisputed that "collectively, Mann, Bratton and Clay tase Lambert twenty times for eighty-seven (87) seconds…". ECF #127-2 at para. 115. This statement is simply inaccurate. The Taser logs cited by Plaintiff show only how many times each Taser trigger was pulled (in probe mode) and how long each Taser discharge lasted (both in real time and elapsed time from the last trigger pull). They do *not* confirm, evidence, or stand as proof that both probes of each Taser actually struck Linwood Lambert, Jr., that a complete electrical circuit was created at each discharge, or that Linwood Lambert, Jr., received any shock from a particular Taser as the result of a particular discharge. The logs can only show when each trigger was pulled and for how long. See Peters' Report at p.28. see also Id. at p. 17 ("Taser ECW discharge does not equate to application.") Plaintiff *assumes* that each discharge in probe mode: 1) resulted in both Taser prongs penetrating Linwood Lambert, Jr., 2) a complete electrical circuit was made connecting the Taser to Linwood Lambert, Jr., and 3) that Linwood Lambert, Jr. received and perceived the effects of the Taser. For the reasons discussed infra., it is clear from the record that not every probe mode discharge resulted in the "Tasering" of Linwood Lambert, Jr.

d. Plaintiff Ignores the Crucial Undisputed Fact: Cause of Death

Finally, Plaintiff ignores the seminal undisputed fact in this record: The direct cause of death of Linwood Lambert, Jr. was "acute cocaine intoxication." See Autopsy Report of Dr. Jennifer Bowers. There is simply *no medical evidence* to the contrary in the record. Dr. Bowers confirms the cause of death in her deposition. See Part II(A) infra. Plaintiff does not offer any evidence, expert or otherwise, to suggest an alternative cause of death, or even to dispute Dr. Bowers' findings. Further, the autopsy report revealed that he suffered no internal injuries, much less any injury caused by a Taser. See Autopsy Report.

Without proof that the cause of death was something other than acute cocaine intoxication, Plaintiff asks this Court to grant partial summary judgment based on Plaintiff's speculation, assumption, and conjecture.

II. Argument

The Officers' use of force, both at the entrance doors to the Halifax Regional Hospital and in the back of the police vehicle was justified and proportional. Further, Plaintiff's reliance on the Taser logs is misleading as not all of the Taser discharges actually sent any voltage to Mr. Lambert and, therefore, had absolutely no effect on him. Finally, Plaintiff cannot and does not show a causal connection between the use of force and the death of Linwood Lambert, Jr. Therefore, Plaintiff's motion for partial summary judgment should be denied.

a. The Officers' Use of Force was Justified

Plaintiff attempts to use Meyers v. Baltimore County, Md., 713 F.3d 723 (4th Cir: 2013) for the proposition that the initial use of force, that is, the first Taser use outside of the doors of the Halifax Regional Hospital was unjustified. Such reliance on Meyers is misplaced. Linwood Lambert, Jr. had just committed a crime in the presence of the Officers, disobeyed the Officers' verbal commands on multiple occasions, damaged not only the police cruiser but also the property of the Halifax Regional Hospital, and though in handcuffs, he was completely out of control. "Lambert's behavior indicates that he was not under control at the time he kicked out the patrol car window then shortly thereafter, ran from the officers." John Combs' Report, at p. 8.

In that context, the requirements of Meyers are more than satisfied. In fact, Meyers' proscription against repeated use of Tasers is clear and unambiguous: "It is an excessive and unreasonable use of force for a police officer repeatedly to administer electrical shocks with a taser on an individual who is no longer armed, has been brought to the ground, has been restrained physically by several other Officers ***and*** no longer is actively resisting arrest." Meyers, 713 F.3d at 734. For the entire time period that Linwood Lambert, Jr. was just outside the doors to the Halifax Regional Hospital, it is undisputed that he was unarmed, that the first Taser application brought him to the ground, and that there were three officers near Mr. Lambert. However, while Mr. Lambert was in restraints, he very clearly was not *restrained*, nor did he stop "actively resisting arrest." These actions are clearly shown by Mr. Lambert's continuing efforts to kick the Officers while they are *attempting* to restrain him. See Clay Video 2 at 9:05 – 9:59.

Similarly, Plaintiff's reliance on other Circuits' precedents is misplaced. The standard cited by Plaintiff in Wells v. City of Dearborn, 538 Fed. Appx. 631, 638 (6th Cir: 2013), that it is illegal to deploy "non-lethal, temporary incapacitating force, including tasers on a handcuffed suspect *who no longer poses a safety threat, flight risk and/or is not resisting arrest*" (emphasis added) is inapplicable here because Mr. Lambert clearly posed a safety threat (as he continued to kick at the Officers), clearly was resisting arrest (as he refused to roll onto his stomach, attempted to kick the Officers, and did not comply with their commands). Similarly, the same theme running through all of Plaintiff's citation of case law, that the use of Tasers is inappropriate when a subject is restrained, under control, and not actively resisting arrest, does not square with Mr. Lambert's actions. Mr. Lambert was violent, destructive, and non-compliant with verbal commands to cease his violent and destructive behavior. The Officers' use of force is squarely within the bounds of the Fourth Amendment, is justified, and the Officers are entitled to qualified immunity.

While the analysis shifts to a Fourteenth Amendment calculus once Mr. Lambert is placed under arrest, the standard set out in Orem v. Rephann, 523 F.3d 442, 446 (4th Cir: 2008) was not violated by these Officers' actions. Specifically, Orem lays out three factors for the Court to consider (all cited by Plaintiff): 1) the relationship between the need for the application of force and the amount of force used (the proportionality of the force employed), 2) the extent of the injury inflicted, and 3) whether the force was "applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm." Id.

Addressing each of these three factors in turn leads to the inexorable conclusion that the Officers' actions were justified. First, no Tasers were deployed against Mr. Lambert while he was being taken to the police cruiser. When Mr. Lambert was finally placed back into the same police cruiser with the window he had just destroyed, he continued to move around the back seat despite being in handcuffs and leg restraints. Clay Video 2 at 12:49 – 17:39. In order to secure him with a seatbelt for transport, the officers told Mr. Lambert to put his feet down on the ground.[2] Id. at 17:41. The request to "put your feet down" was repeated several times. Id. at 17:41 – 18:00. Despite the repeated directions, Linwood Lambert, Jr. refused to comply. Id. Mr. Lambert was hitting his head on various parts of the cruiser, and constituted a danger to himself as well as to the Officers, who could not secure him without having his seatbelt fastened. Mr. Lambert refused to comply with the request to "sit up" even when a Taser was placed against his shoulder (but not yet deployed). Id. at 18:00 – 18:07. Mr. Lambert was then told, repeatedly, to sit up in the back seat of the car. He was even warned that if he did not sit up he would be tased again. Mr. Lambert still refused to comply. Id. at 18:07 – 18:53. It was not until Officer Mann entered the vehicle that he was able to place Mr. Lambert in a seatbelt, but even that maneuver met with resistance from Linwood Lambert, Jr. Id. at 19:19 – 20:00. While Officer Mann was attempting to secure Mr. Lambert in the seatbelt, Mr. Lambert attempted to bite Officer Clay. Id. at 20:00 – 20:08.

Clearly, Mr. Lambert was neither "secure", "restrained", or "under control" at the time Tasers were used in drive stun mode. The video evidence clearly demonstrates this fact. Accordingly, some force was justified. The force used by the Officers, namely use of their Tasers in drive stun mode, was proportional to the threat posed by Mr. Lambert. Unlike probe

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[2] At this time, Mr. Lambert was sticking his feet outside of the shattered window of Officer Clay's cruiser, and the Officers' commands to put his feet "down on the ground" was in response to this action.

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mode, which is designed to incapacitate a subject, "The Taser used in drive stun mode is used as a pain compliance technique, much as an officer would use pressure point control." Combs' Report at p. 8. See also Peters' Report at p. 18 ("Drive stun, or contact mode without probes, is intended only to cause compliance through localized pain, and will not produce NMI." [neuromuscular incapacitation]). The use of a Taser in drive stun mode while Mr. Lambert was out of control in the back seat of the police cruiser was objectively reasonable.

Second, Plaintiff presents no evidence whatsoever as to the extent of any injury suffered by Mr. Lambert beyond the photographs attached to their motion for partial summary judgment. These photographs do not purport to, and cannot prove, a causal connection between the use of Tasers by the Officers and Mr. Lambert's death. Not only is there a lack of evidence in this record that Taser use, or any use of force by the Officers, was the direct proximate cause of Linwood Lambert, Jr.'s death, there is ample, and uncontested evidence that the direct cause of death was acute cocaine intoxication. See Autopsy Report. This lack of a relationship between the use of force by the Officers and Mr. Lambert's death was confirmed by the medical examiner in her deposition:[3]

> "Q: Let me see if I understand. With Mr. Lambert's case, in your opinion, if you take out tasering, take out the stress, take out the arrest, take out handcuffs and shackles, but leave in the ingestion of cocaine, it's your opinion, with reasonable medical probability or certainty, that Mr. Lambert would have died on May 4, 2013?
>
> A: I think reasonably, yes, especially based on his symptoms.
>
> Q: Now, take out, with Mr. Lambert's case, take out the cocaine, but leave in the tasering, the stress, the arrest, handcuffs and shackles, is it your opinion, with reasonable medical certainty or probability, that Mr. Lambert would not have died on May 4, 2013?
>
> A: I'd be hard pressed to say that he would have died. I mean, again, we're getting into the minutia. Exceptions exist, that for some people that's enough. But given what I have on him right now, I think it's more likely he would have lived. However, we'll never know."

[3] Counsel for Plaintiff placed objections on the record during this exchange. Those objections are excluded here, but appear in full in the Deposition of Dr. Jennifer Bowers, M.D., attached hereto. This deposition was received by undersigned counsel on December 29, 2015. As the Court will see, the deposition has not yet been signed by the deponent.

Deposition of Dr. Jennifer Bowers, M. D. (Attached hereto as Exhibit A), at pp. 347-348.

There is no contradictory evidence in the record upon which this Court could conclude that the use of force by the Officers during their interaction with Mr. Lambert caused his death. Without this connection, and without any other medical evidence of injury short of death, Plaintiff cannot prove, and this Court cannot surmise or conclude that the Officers' actions ran afoul of Orem, as there is no evidence of any injury inflicted by any defendant in this case which caused Mr. Lambert's death.

Third, it is clear from the videos that the Officers' intent was to secure Mr. Lambert and bring him under control, was done in good faith and not "maliciously sadistically [done] for the very purpose of causing harm." Plaintiff attempts to cite certain statements made by Officer Mann to demonstrate a malicious or sadistic intent. See ECF#127-3 at p. 12. While these comments were not necessary to effectuate the transportation of Mr. Lambert, they were made *after* the force had been applied. Additionally, it is clear from the videos that no force was applied against Mr. Lambert once he was secured, restrained, and under control in the back of Officer Clay's police cruiser. No officer used force against Linwood Lambert, Jr., through a Taser or otherwise, before he destroyed the police cruiser window, nor after he was secured, restrained, and under control in the back seat of the police cruiser. The timing of the use of force, the lack of any medical evidence that such force caused Mr. Lambert's death, and the proportionality of the force applied clearly indicate a good faith intent on the part of the Officers, Officer Mann's comments notwithstanding.

The Court need look no further in determining that the Officers acted with good faith than their conduct toward Mr. Lambert at the Super 8 Motel and during the transport to the

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Halifax Regional Hospital. The Officers treated Mr. Lambert with respect, professionalism and courtesy. Had they had any ill motive or malicious intentions toward Mr. Lambert, such intent would be manifest from the moment the Officers began their interaction with Mr. Lambert. Rather, what the evidence in this record shows, and what Plaintiff cannot dispute, is that there was no force used against Linwood Lambert, Jr. until after **he** became violent and destructive. This clearly evinces a good faith effort to keep order on the part of the Officers, not a sadistic or malicious intent to wantonly cause pain.

Plaintiff attempts to take issue with alleged violations of South Boston Police Department policies and various Taser warnings. Both miss Plaintiff's intended mark. First, Chief Binner found that no departmental policies were violated. Binner Deposition (Attached hereto as Exhibit B) at p. 174. Specifically, Chief Binner testified as follows:

> "Q: Having gone over the circumstances of the incident; Mr. Lambert being handcuffed in an area where he had limited ability to maneuver, because he couldn't get in the door, the fact that he didn't have a weapon, and that there were three officers; was the 74 seconds of tasing a reasonable response?
>
> A: If you go by this – the – the time on the call logs, and assuming they were contacts, I would say it's reasonable. But you've been talking – They – I believe the officers followed policy."

Binner Deposition at p. 74.

Second, given the fact, evidenced in the videos, that Mr. Lambert was not restrained (despite being in restraints) nor under control, Chief Binner's conclusion that there was no violation of departmental policy was reasonable. Similarly, South Boston Police Officers do not receive medical assessment training. Binner Deposition at p. 85. Accordingly, Chief Binner's conclusion that the Officers did not violate departmental policy by transporting Mr. Lambert to the jail, as opposed to proceeding inside the emergency room, is a reasonable conclusion. Third, the policies of the South Boston Police Department are not as rigid as Plaintiff suggests:

"Q: And general orders are mandatory that they're followed; correct? They govern the practice of the Department?
A: Not always mandatory.
Q: Okay. Unless the policy states otherwise, is it mandatory to comply with the orders that are in the manual?
A: They're general orders. They're guidelines for the officers to follow.
Q: What discretion do the officers have to stray from the – the general orders, when they're in the field?
A: I guess it all determines – it depends on the situation."

Binner Deposition at pp. 131-132

Plaintiff offers no expert witness who has reviewed the South Boston Police Department's policies and procedures, or assessed the Officers' conduct in accord with those polices, or opined that there has been any violation of those policies. On an even more basic level, Linwood Lambert, Jr. was not "defenseless" as Plaintiff contends. See Statement of John Peters (Exhibit F) at p. 3. Para. 12 (opining that Mr. Lambert was still able to cause damage even though he was in restraints).

Likewise, Taser warnings are guidelines, as opposed to mandatory rules that the Officers were required to follow. Plaintiff points out the ineffectiveness of Tasers as a law enforcement tool if all warnings were treated as mandatory. See quote of Tiffaney Bratton at ECF#127-2 at para. 143 (arguing that if one abided by every single warning, no one would ever be tased). Chief Binner confirmed that the Taser warnings are to be used "as a guideline." Binner Deposition at p. 83. "The Taser guidelines. Each individual incident presents different. They are just suggestions." Id. at p. 90.

Notwithstanding the nature of the policies of the South Boston Police Department, the question of qualified immunity does not rise and fall solely on the degree of obedience to departmental policy. Rather, the question of objective reasonableness is viewed through the perspective of the officers at the scene. "...using the officer's perception of the facts at the time limits second guessing the reasonableness of actions with the benefit of 20/20 hindsight. Second, using this perspective limits the need for decision-makers to sort through conflicting versions of the "actual" facts, and allows them to focus instead on what the police officer reasonably perceived." Holly, 533 Fed. Appx. supra. at 217 citing Gooden v. Howard County, Md., 954 F.2d 960, 965 (4th Cir. 1992) (en banc).

When so viewed, it is clear that the use of force by the Officers was objectively reasonable and constitutional. Linwood Lambert, Jr.'s rights under the Fourth and Fourteenth Amendments were not violated, and the Officers are entitled to qualified immunity.

b. **Plaintiff's Reliance on the Taser Logs is Misleading Without Any Expert's Opinion in Support**

Plaintiff quotes extensively from the Officers' Taser logs, as well, and even compares them in chart form to the discharges in Meyers. ECF#127-3 at pp.28-29. However, Plaintiff's use of these tables for the conclusion that they accurately reflect the total amount of exposure to the Tasers by Mr. Lambert is misleading and without evidentiary support. The charts "show the frequency and duration of the Officers' ECW discharges. Discharges *do not* equate to application, because probes could have missed, came loose, or officers could have had their finger on the trigger firing the ECW into the air." Peters' Report at p.28. see also Id. at p. 17 ("Taser ECW discharge does not equate to application.") (emphasis in original).

Ample evidence exists in the record that numerous discharges of the Taser failed to have any application, and, thus, any effect on Mr. Lambert. First, Officer Bratton testified that she did not believe her initial Taser discharge had been effective. Bratton Deposition at pp.127-134. This ineffectiveness was caused by the failure of both probes to attach to Mr. Lambert, a fact evidenced by the arcing sound and visible sparks appearing on the video. See Clay Video 2 at 8:17. "If one probe does not make contact with the target in probe mode, the electrical circuit is not completed and therefore produces not [sic] neuromuscular incapacitation (NMI) on the individual." Peters' Report at p.11. Further, the autopsy report indicated that there were only three puncture wounds consistent with a Taser barb on Mr. Lambert (where, if two circuits had been completed, there would be four).

Plaintiff deposed Matt Gilliam, the head Taser training instructor for the South Boston Police Department from approximately 2011 to 2014. Despite the following evidence offered by Mr. Gilliam, Plaintiff still presented, in her motion, the Taser logs as evidence of effective application against Mr. Lambert, as opposed to what they really show: the number of times the Taser was discharged:

> "Q: From one of the dash cams of the police cruiser that actually showed the incident, did you feel that the use of the tasers by the officers was reasonable under the circumstances?
> A: Yes, sir, I do.
> Q: Why is that?
> A: The taser – the taser, when you have a full circuit, when the two probes are physically in contact with the person, both leads going through the grooves are still connected, the taser has a specific sound, and it's a popping, it's an arcing sound, but it's a quiet popping or arcing. If one of those leads break or if one of the probes gets pulled out by rolling around on the ground, it immediately starts a very loud arcing, which means you don't have a full circuit. That taser's doing no good at that point."

Deposition of Matt Gilliam (attached as Exhibit "C") at pp.19-20.

> "Q: I'd like you to look at the bottom box that's located on that document. Is there a warning there that pertains to cumulative effects?
> A: Yes, it does.
> Q: Okay. And is that a warning that your – the officers that you certified and recertified were required to understand, obey, and implement in the field?
> ... (intervening objections omitted)
> A: Okay. Yes, it should be respected, but each officer is taught, as I was talking in the very beginning, the difference of that sound of that taser having a complete circuit or a broke circuit. If you do not have a complete circuit, I see no reason why a second taser shouldn't be deployed, and that taser, if it does not have the complete circuit, because that person's rolling around or either you miss with one, one prong, and it's very easy to do, a third taser. If somebody can make a complete circuit, the taser will do the job, and the other tasers, they're basically doing nothing."

Gilliam deposition at pp. 34-35.

> "Q: Okay. Now, the second point, you said that the second officer deploying was reasonable. Why was the second officer's deployment reasonable if the first deployment caused Mr. Lambert to call [sic] to the ground?
> A: Because Mr. Lambert had started rolling around because the second, or one of the leads had been broke. The other officer could hear the difference in the taser from the first officer, and my assumption, again not talking to any of them about it, but my assumption would be he's been trained, or she's been trained, the sound of that taser when it's got a full circuit and when it doesn't.[4] Their observance of him locking up and falling over perfect indication full circuit, taser's got a low arc to it, but when it hits the ground, the arc gets very loud and he gets scuffled around and moving again, possibly trying to get back up. I can't read Lambert's mind. None of us in this room can, but the second officer knew that if he could get a full circuit or she could get a full circuit, to lock Mr. Lambert up, keep him from kicking, keep him from scuffling around on the ground, there's a less of a chance they're going to hurt or get hurt, and there's a less of a chance that Mr. Lambert is going to get hurt."

Gilliam deposition at pp. 56-57.

Even the South Boston Chief of Police, when questioned about whether the Officers' use of force was reasonable, indicated that the Taser logs could not be taken at face value due to evidence of arcing present in the video:

> "Q: Okay. Now, pursuant to the Department's use of force policy, should a taser be deployed on a handcuffed suspect for 51 seconds?
> A: If it is a direct contact, perfect contact, no, sir.
> Q: Okay. And what do you mean by a 'direct contact?'
> A: To probes made contact, and – and the device acting just to the way it's supposed to function.
> Q: Okay. Now, you reviewed the video of May 4, 2013, and your response suggests to me that it may – may not have been based upon your view of perfect contact. Is that – is that what I'm to understand?
> A: Yes.
> Q: What kind of contact did you observe in the video?
> A: Arcing.
> Q: Now, what is arcing?
> A: It is a number of things. This – this appeared to be the contacts were making – on the leads to the wires were on the ground, and they were arcing. The one thing I remember is seeing that they were – that they were, it was arcing on the ground, which wasn't –
> Q: Now –
> A: -- affecting the weapon."

Deposition of James W. Binner at pp. 57-58.

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[4] Officer Bratton's testimony at pp.127-134 of her deposition confirm Mr. Gilliam's assumption that she knew that her discharge had been ineffective.

Q: "Are you aware whether or not 61 seconds of tasing, in the logs that we've gone through and the time frame that we've gone through, by Officer Bratton is a reasonable response by law?
A: On the circumstances, I would have to say yes, that was reasonable.
Q: And what are the circumstances that made the response reasonable?
A: That the taser was not effective in restraining Mr. Lambert.
Q: Okay. Now, is it your testimony that just because – strike that. Is it your testimony that the effectiveness of the taser in subduing the suspect is the determinative factor in how long it can be deployed?
A: No.
Q: Okay. Then what is – what are the factors in determining how long that the taser can be safely deployed on a suspect?
A: Whether the contacts are good contacts on the individual. The arcing. The trigger can be – It's going to record, no matter where the probes are. They can be not in and the trigger squeezed and still recording."

Binner Deposition at pp. 76-77.

The video evidence, medical evidence, testimony of the Officers, Dr. Peters' analysis and the testimony of Mr. Gilliam and Chief Binner all clearly demonstrate that although two Tasers were discharged at the same time in probe mode, at least one did not have any application or effect on Mr. Lambert. This undermines Plaintiff's entire Meyers comparison, which further rests on the faulty assumption that even if two Tasers were deployed *and effective* at the same time that Mr. Lambert was subject to double the amount of electricity. "Electricity is not cumulative, and does not build-up in the body like poison. Mr. Lambert was not subjected to 100,000 volts of electricity as alleged in Plaintiff's Amended Complaint." Peters' Report at p.16.

This evidence is not contradicted by Plaintiff in any meaningful way. Plaintiff does not, in her motion, offer any expert analysis, address the issue of an incomplete circuit, nor does she attempt to accurately portray which discharge actually had an effect on Mr. Lambert. Defendants take the position that even if Plaintiff engaged in such an undertaking, it would be irrelevant to a Meyers comparison or a qualified immunity analysis, because the facts of the instant case are in stark contrast to Meyers. Mr. Meyers was Tased until he was unconscious.

Mr. Lambert did not lose consciousness until well after the Tasers were used, and even then there is no medical evidence in the record that he lost consciousness *due to* the use of Tasers (unlike Meyers). Unlike Mr. Meyers, Mr. Lambert was actively resisting the Officers, actively refused their commands, and was not restrained and in control until he was secured in the back of the police cruiser, at which time he was no longer subject to Tasers.

Thus, even if Plaintiff had offered an accurate chart comparison to Meyers, such a comparison is irrelevant because the circumstances surrounding the Taser usage differs between Meyers and this case.

The foundation of Plaintiff's argument is that the Officers' use of Tasers was inherently deadly and caused Mr. Lambert's death. This position is in contrast to the rest of the country, which is moving *toward* Taser use as a safer and less than lethal alternative to the use of firearms.[5] Given the choice between using their firearms or deploying their Tasers, the Officers' use of force was reasonable and appropriate under the circumstances.

Plaintiff's position also goes against the basic science underpinning the use of Tasers. "Plaintiff greatly embellished the capability of a TaserX26 electronic control weapon when claiming that the ECW 'electrocuted' Mr. Linwood Raymond Lambert, Jr." Statement of John Peters ("Peters Statement", attached hereto as Exhibit F) at p.2. The TaserX26 "is incapable of producing enough voltage, and more importantly amperage, to electrocute a human being." Id. If an electrical current is strong enough to actually kill someone, it will do so in 1-5 seconds. Id. (internal citation omitted). Further, the amperage produced by the TaserX26 (amperage being the dangerous element in an electrical current) is less than a Christmas Tree bulb. Id. at p.3. Clearly, Plaintiff is misrepresenting the actual effect of Tasers on Linwood Lambert, Jr.

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[5] See, e.g. Chicago Police Department to issue Tasers to each officer as a major overhaul addressing the "shoot first ask questions later" stigma attached to the department. Retrieved at http://www.cnn.com/2015/12/30/us/chicago-police-policy-tasers/ on December 30, 2015 at 11:55am.

c. Plaintiff Cannot and Does Not Show a Causal Connection between the Use of Force and the Death of Linwood Lambert, Jr.

Defendants have consistently maintained that there is no evidence in the record that establishes a causal connection between Linwood Lambert, Jr.'s death and the use of force by the Officers. Beyond the persuasive and uncontradicted autopsy report and the testimony of Dr. Bowers, supra., Dr. Peters provides ample scientific backing for his conclusion that "Correlation of a TASER-brand electronic control device application to a part of the human body followed by the person's dying from alleged heart or respiratory arrest does not scientifically establish causality." Peters' report at p. 19 para. 18.

Plaintiff cannot survive a motion for summary judgment based on qualified immunity at this stage absent a showing that the direct, proximate cause of Mr. Lambert's death was the action or inaction of the Officers involved. Plaintiff has not done so. More persuasively, Plaintiff does nothing to contradict the medical and scientific evidence that cuts *against* any conclusion of causality. As Dr. Bowers succinctly testified, if the Officers used no force, no restraints and caused no stress to Mr. Lambert, he would have died anyway. There is no medical evidence in the record to indicate that but for the Officers' decision not to take Mr. Lambert into the emergency room, he would have lived.[6]

Further, there is no expert evidence in the record before the Court indicating that the use of force employed by the Officers was excessive, unconstitutional, or unjustified. As is often the case in the modern world, citizen bystanders who witness an incident often provide the most vitriolic criticism of the actions of police officers. Yet even in this case, two disinterested citizens reported, a mere two days after the incident, that from their observations, the Officers acted appropriately. See Statement of Patricia Slayton Blevins, Exhibit D ("...[the Officers] acted professionally and did what they should do."). see also Statement of Jamie Elizabeth Morgan, Exhibit E ("When asked how the police response was, she stated that they didn't seem to act out of line.").

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[6] Although Plaintiff raises the claim of unconstitutional deprivation of medical care in her Second Amended Complaint, she does not request summary judgment on this point in her motion. Therefore, at this stage, there is no request before the Court from Plaintiff to grant her summary judgment on qualified immunity on the allegation that these Defendants unconstitutionally denied Linwood Lambert, Jr. necessary medical attention.

III. Conclusion

Plaintiff cannot and does not provide any causal link between the Officers' actions and Linwood Lambert, Jr.'s death. The Officers' actions were reasonable in light of the circumstances of the case, especially in light of Mr. Lambert's own violent and destructive actions. Finally, as Dr. Bowers opined, Mr. Lambert's cocaine ingestion caused his death, *not* the actions of the Officers. Even if the Officers used no Tasers, no restraints, and caused him no stress, Mr. Lambert would have died because he chose to ingest cocaine. Mr. Lambert's death is tragic, but it is not the fault of Officer Tiffaney Bratton, Officer Travis Clay, or Officer Clinton Mann. Plaintiff's Motion for Partial Summary Judgment should be denied.

CHIEF OF POLICE, JAMES W. BINNER, COLONEL, ET ALS.

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CERTIFICATE OF MAILING

I hereby certify that on the 30th day of December, 2015 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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